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IN THE

Supreme Court of the United States

October Term, 1949

No. 25.

ELMER W. HENDERSON,

Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and SOUTHERN RAILWAY COMPANY.

On Appeal from the United States District Court for the District of Maryland

MOTION AND BRIEF OF AMERICAN JEWISH CONGRESS AS AMICUS CURIAE

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MOTION OF AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for the American Jewish Congress and on its behalf, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.*

The American Jewish Congress is an organization committed to the principle that the destinies of all Americans are indissolubly linked and that any act which un-

justly injures one group necessarily injures all. Out of this firmly held belief, the American Jewish Congress created its Commission On Law and Social Action in 1945 in part "To fight every manifestation of racism and to promote the civil and political equality of all minorities in America."

Believing as we do that Jewish interests are inseparable from the interests of justice, the American Jewish Congress cannot remain impassive or disinterested when persecution, discrimination or humiliation is inflicted upon any human being because of his race, religion, color, national origin or ancestry. Through the thousands of years of our tragic history we have learned one lesson well: the persecution at any time of any minority portends the shape and intensity of persecution of all minorities. There is, moreover, an additional reason for our interest. The special concern of the Jewish people in human rights derives from an immemorial tradition which proclaims the common origin and end of all mankind and affirms, under the highest sanction of faith and human aspirations, the common and inalienable rights of all men. The struggle for human dignity and liberty is thus of the very substance of the Jewish tradition.

We submit this brief *amicus* because we are convinced that the policy of segregation has had a blighting effect upon Americans and consequently upon American democratic institutions. We believe that the doctrine of "separate but equal" has engendered hatred, fear and ignorance. We recognize in this triumvirate our greatest enemy in the struggle for human freedom. But our concern must not be construed as limited to minorities alone. The treatment of minorities in a community is indicative of its political and moral standards and ultimately determinative of the happiness of all its members. Our immediate objective here is to secure unconditional equal-

ity for Americans of Negro ancestry. Our ultimate objective in this case, as in all others, is to preserve intact the dignity of all men.

We have sought the consent of counsel for the four parties to the filing of this brief. Counsel for appellant, the United States and the Interstate Commerce Commission have consented. Counsel for the Southern Railway Company has refused consent.

Dated, New York, New York, October 17, 1949.

WILL MASLOW,
Attorney for American Jewish Congress.

IN THE

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BRIEF OF AMERICAN JEWISH CONGRESS AS AMICUS CURIAE

The American Jewish Congress respectfully submits this brief, as *amicus curiae*, in support of appellant. Our interest in the issues raised by this case is set forth in the motion for leave to file annexed hereto.

Statement of the Case

This proceeding originally arose out of the refusal of the Southern Railway, on May 17, 1942, to serve appellant, a Negro, in one of its dining cars. The various steps in the subsequent proceedings are fully set forth in the

appellant's brief. Because the railroad subsequently changed its rules, the issue presently before this Court is sufficiently revealed by the following facts:

The railroad's most recent rules, effective March 1, 1946, provide that, after certain structural changes are made in its diners, one of the thirteen tables in each diner will be reserved absolutely for Negroes, and will be separated from the rest of the car by a five-foot partition. No white passengers will be served at this one table and no Negro passengers will be served at the other twelve tables.

On September 5, 1947, the Interstate Commerce Commission held that this rule satisfied Section 3(1) of the Interstate Commerce Act. *Henderson* v. *Southern Railway*, 269 I. C. C. 73. That decision was upheld by a three-judge District Court (*Henderson* v. *Southern Railway*, 80 F. Supp. 32, D. C. Md., 1948), Judge Soper dissenting, and the present appeal is from the decision of that Court.

The Question to Which this Brief Is Addressed

This brief is addressed solely to the question whether the requirements of equality contained in either the Fifth and Fourteenth Amendments to the United States Constitution or Section 3(1) of the Interstate Commerce Act, 49 U. S. C. 3(1), are satisfied by affording "separate but equal" facilities to Negro and white passengers on interstate railroads.

Summary of Argument

I. In holding that a requirement of equal treatment can be satisfied by providing segregated facilities, the decision in *Plessy* v. *Ferguson* was wrong historically, legally and factually.

A. The Court erred historically in finding that the Fourteenth Amendment was not "intended to abolish distinctions based on color."

B. The Court erred as a matter of law in holding that segregation laws could be sustained either as an exercise of the police power or on the theory that physically equal facilities were necessarily equal in the Constitutional sense.

C. Assuming that segregated facilities can be equal, the Court erred as a matter of fact in concluding that officially imposed segregation does not place a badge of inferiority on the Negro race.

(1) Segregated facilities necessarily have an inferior value if they are assigned to a group in the community which the dominant group regards as inferior. In determining the value of a particular piece of property, the law examines not only its physical characteristics but also any other intangible factors which are given weight by the community at large. When the facilities are used exclusively by a group which the community regards as inferior, they become inferior in value.

(2) Even if the facilities are in all respects equal in value, segregation is discriminatory because of the adverse effect which it has on the Negro community. Recent studies reveal unanimity of opinion among students of race relations

that segregation causes psychological damage to the individual members of the Negro community which they would be spared if segregation were not imposed.

II. A requirement of equality can never be satisfied by segregated facilities because the official act of segregation of itself gives superior value to the facilities assigned to the dominant group.

A. An official policy of segregation would unquestionably be unconstitutional if the official body which imposed it simultaneously proclaimed that maintenance of racial superiority was its purpose.

B. The placing of a racial or religious group in inferior status by segregation can be accomplished without such an express declaration of status. Otherwise it would be easy to evade the constitutional restraint. The implicit declaration of inferiority can be made either in other official acts or by incorporating in the segregation policy a previously existing social stratification.

C. The segregation of Negroes does in fact maintain an officially declared status of inferiority as well as a previously established status of social inequality.

(1) Official declarations of inferiority are found in various statutes and in judicial decisions holding, for example, that it is libelous *per se* to call a white man a Negro and that a white man required to ride in a Negro coach may recover damages.

(2) The previously established social inequality is shown by the unanimous findings of students of race relations.

III. The separate but equal doctrine has never been, and should not now be, applied to Section 3(1) of the Interstate Commerce Act by this Court. This case can be decided in favor of appellant without overruling the holding in *Plessy* v. *Ferguson* that segregated facilities may be provided without violating the Fourteenth Amendment.

ARGUMENT

POINT I

The doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, that separate but equal facilities satisfy requirements of equal treatment, should be overruled.

Subseetion 1 of Section 3 of the Interstate Commerce Act provides that:

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Since the question was first raised, the Interstate Commerce Commission has consistently held that this provision forbids discrimination against Negro passengers because of their race. *Councill* v. *Western & Atlantic R. R. Co.*, 1 I. C. C. 339; *Heard* v. *Georgia R. R. Co.*, 1 I. C. C. 428; *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I. C. C. 399; *Stamps & Powell* v. *Louisville & Nashville R. R. Co.*,

269 I. C. C. 789. See also *Mitchell* v. *United States*, 313 U. S. 80, 95. In *Edwards* v. *Nashville, C. & St. L. Ry. Co.*, 12 I. C. C. 247, 249, the principle was thus stated:

> "If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations shall be provided for colored passengers of the same class. The principle that must govern is that carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects the passenger to 'undue and unreasonable prejudice and disadvantage.'"

Section 3(1) of the I. C. C. Act, however, is not the only prohibition of discrimination which has been invoked here. The United States Government, in its brief as a party to this case, suggests that the Fifth Amendment to the United States Constitution also applies because the alleged discrimination was approved by an agency of the Federal Government, the I. C. C. (U. S. Brief, pp. 14-15). We agree. Indeed, the Court below itself recognized that the railroad's regulations were "directly approved by" the I. C. C., and hence "are to be treated, for the purposes of this case, as in effect the Commission's rules." 63 F. Supp., at page 914.

We suggest further, however, that the equal protection clause of the Fourteenth Amendment also applies. Railroads enjoy a monopolistic position protected by both the State and Federal governments. We believe that any such governmentally protected monopoly is forbidden by the Constitution from engaging in racial discrimination. It is true that this Court has never so held but that is only because virtually all such monopolies are subject to common law or statutory prohibitions of discrimination. It is unthinkable that, if these prohibitions were removed by statute, a railroad could refuse to serve any passenger solely because of race.

We shall not elaborate on these points because this brief is restricted to a single question which is common to all these prohibitions of discrimination; namely, whether they are satisfied when "separate but equal" facilities are offered. In the *Plessy* case, this Court held that they were, at least with respect to the Fourteenth Amendment. While the present case can probably be decided without overruling the *Plessy* case, as we show below, the factual premises and legal conclusions of that decisio can not be ignored altogether. We turn first, therefore, to an examination of those premises and conclusions.

The result in the *Plessy* case rested on what we believe to have been a series of errors. First, the Court made the startling assumption that "in the nature of things it [the Fourteenth Amendment] could not have been intended to abolish distinctions based on color" (162 U. S., at 544). We show below that this statement is historically false (pp. 10-14). The Court then held that segregation could be legally justified as an exercise of the police power or on the ground that the facilities offered are in fact equal and thus satisfy the constitutional requirement of equality. We discuss this argument at pages 15-16. Finally, the Court recognized that the requirement of equality could not be satisfied by a system of segregation which created or maintained inequality. The Court declared that "Every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith and for the promotion of the public good and not for the annoyance or oppression of a particular group." 163 U. S., at 550. In finding, however, that a law requiring segregation on railways was constitutional, it made the factual and sociological assumption that such segregation would "not necessarily imply the inferiority of either race to the other." *Id.*, at 544. We show below (pp. 17-26) that this assumption has been exploded in the 50 years which have elapsed since it was made.

The net effect of the *Plessy* decision was to measure the constitutional command of equality mechanically in terms of physical dimensions and quantity. As a result it has infused rigid, caste stratifications into our laws, our institutions, our conduct and our habits of perception until "the Negro is segregated in public thought as well as public carriers." Moton, *What the Negro Thinks*, 1929, page 55. We submit that what the President's Committee on Civil Rights called "the 'separate but equal' failure" (Report, *To Secure These Rights*, 1947, p. 79) should be reexamined by this Court and that *Plessy* v. *Ferguson* should be overruled.

A. The Framers of the Fourteenth Amendment Intended Thereby to Prohibit Segregation

Plessy v. *Ferguson* cannot be squared with the temper and philosophy of the 1860's which created the Fourteenth Amendment. See Note, *Is Racial Segregation Consistent With Equal Protection of the Laws?* 49 Columbia L. R. 629. It is in fundamental conflict, for example, with *Railroad Co.* v. *Brown*, 17 Wall. 445. In that case, Brown, a Negro, sued for damages for exclusion from a railroad car in the District of Columbia. The Federal statute, 12 Stat. 805, enacted in 1863, in the midst of the Civil War, authorized the railroad to operate and provided that "no person shall be excluded from the cars on account of color." The railroad ran two identical cars on a train, one for Negroes and the other, from which it excluded Brown, for whites. The trial Court specifically refused to instruct, as the railroad requested, that if the cars were "really safe, clean and comfortable," the railroad should prevail. In the trial court the plaintiff was awarded substantial damages for the exclusion. This Court affirmed, terming the segregation "an ingenious attempt to evade compliance with the obvious meaning of the requirement." It held that

to force Negro passengers into separate cars was discrimination incompatible with the equality demanded by Congress. Thus, this Court held that separate but equal accommodations have the same legal effect as the total exclusion of Negroes from transportation.

That those responsible for the enactment of the Fourteenth Amendment rejected segregation was further evidenced by the passage of the Civil Rights Act of 1866. Like the Amendment itself, this Act was designed to eliminate the distinctions contained in the Black Codes passed by the Southern State governments during the post-Appomattox months of 1865. *Slaughter House Cases*, 83 U. S. 36, 70. These codes, among other provisions, placed limitations on Negro rights to own property, to institute law suits or to testify in any proceedings. They applied greatly different penalties to Negroes than to whites for the same offenses. See McPherson, *Political History of the United States During Reconstruction*, Chapter 4. To prevent these distinctions, a civil rights bill was introduced forbidding these and related practices and forbidding also, in a general phrase, any discrimination as to civil rights. S. 61, 39th Congress, First Session. Senator Howard, who had participated in drafting the Thirteenth Amendment, supported the bill, declaring that "in respect to all civil rights, there is to be thereafter no distinction between the white race and black race." Congressional Globe, 39th Congress, First Session, 504. Senator Trumbull, who introduced the civil rights bill, asserted "* * * the very object of the bill is to break down all discrimination between the black men and white men." *Ibid.*, page 599. The bill passed the Senate but ran into difficulties in the House, partly because it was felt that "civil rights" encompassed a scope too broad to be supported by the Thirteenth Amendment. The final bill, therefore, was limited to the elimination of the named abuses with the general and vague reference to civil rights

omitted. 14 Stat. 27. The significance of this statute, in the interpretation of the Fourteenth Amendment, has recently been described by this Court (*Hurd* v. *Hodge*, 334 U. S. 24, 32, footnotes omitted):

> "Both the Civil Rights Act of 1866 and the joint resolution which was later adopted as the Fourteenth Amendment were passed in the first session of the Thirty-Ninth Congress. Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy."

Almost immediately following ratification of the Fourteenth Amendment and pursuant to the grant of authority contained in its fifth section, Senator Sumner of Massachusetts introduced a proposal expanding and articulating the rights implicit in the new amendment. During argument on this bill, which later became the Civil Rights Act of 1875, Sumner enunciated his attitude toward racial segregation. He spoke as one of the leaders who had achieved the passage of the Fourteenth Amendment and who might be supposed to know it best; he was supported by what he believed was the unavoidable intention of the Amendment. Sumner lashed out at what he called the "excuse, which finds Equality in separation" by declaring (Cong. Globe, 42nd Cong., 2nd Sess., 382-383):

> "Separate hotels, separate conveyances, separate theaters, separate schools, separate institutions of learning and science, separate churches, and separate cemeteries — *these are the artificial substitutes for Equality;* and this is the contrivance by which a transcendent right, involving a transcendent duty, is evaded. * * * Assuming what is most absurd to as-

> sume, and what is contradicted by all experience, that a substitute can be an equivalent, it is so in form only and not in reality. Every such attempt is an indignity to the colored race, instinct with the spirit of Slavery, and this decides its character. *It is Slavery in its last appearance.*"

In the debates which ensued, Sumner's views were upheld and the leading cases on which this Court subsequently relied in *Plessy* v. *Ferguson,* although pressed upon Congress, were rejected as unsound. *Roberts* v. *Boston,* 5 Cush. 198 (1850), and *State* v. *McCann,* 21 Ohio St. 198 (1872), both of which defend segregation practices, were mentioned by name and expressly refuted. See Congressional Globe, 42nd Cong., 2nd Sess., at 3261, and 2 Congressional Record 3452 (43 Cong., 1st Sess.). Yet, in concluding that, "'in the nature of things,'" the Fourteenth Amendment was not "intended to abolish distinctions based upon color" (163 U. S., at 544) this Court explicitly relied upon the *Roberts* case!

Nor may the *Plessy* theory that the Fourteenth Amendment was not intended to abolish race distinctions be squared with the recent decisions of this Court. In *Hirabayashi* v. *U. S.,* 320 U. S. 81, 100 (1947), it was said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."

Except for the decisions which rely uncritically upon *Plessy* v. *Ferguson,* this Court has consistently maintained that the Fourteenth Amendment prevents States from

establishing racial distinctions as a basis for general classifications. *Takahashi* v. *Fish & Game Commission*, 332 U. S. 410, 420; *Oyama* v. *California*, 332 U. S. 633, 640, 646; *Shelley* v. *Kraemer*, 334 U. S. 1, 20, 23; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, 374; *Buchanan* v. *Warley*, 245 U. S. 60, 82; *Hill* v. *Texas*, 316 U. S. 400, 404. These cases merely embody the basic constitutional principle applicable in all other areas that governmental classifications must be based upon a significant difference having a reasonable relationship to the subject matter of the statute. *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417; *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U. S. 150, 155; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559, 560.

More specifically, the *Plessy* segregation principle cannot be squared with *Buchanan* v. *Warley*, *supra*, and *Shelley* v. *Kraemer*, *supra*, in both of which this Court refused to apply the separate but equal doctrine to housing. It did so not on the theory that land and houses are *sui generis*, but on the broad ground that "equal protection of the law is not achieved through the indiscriminate imposition of inequalities." *Shelley* case, 334 U. S., at 22. This terse holding, as has been cogently argued, completely destroys the basis of the *Plessy* decision. *Restrictive Covenants and Equal Protection—The New Rule in Shelley's Case*, 21 So. Cal. L. R. 358 (1948).

B. The Legal Principles Which Formed the Basis of the *Plessy* Decision Were Erroneous

The *Plessy* decision sought to justify state segregation statutes both as exercises of the police power and on the theory that, since they restricted all races alike, they satisfied the constitutional requirement of equality (163 U. S., at 544, 546). Neither theory bears examination today.

Particularly vulnerable is what this Court recently called the "convenient apologetics of the police power."

Morgan v. *Virginia*, 328 U. S. 373, 380, citing *Kansas City Southern Railway Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79. In *Buchanan* v. *Warley* this Court said (245 U. S., at 74): ". . . the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution . . ." See also *Shelley* v. *Kraemer*, 334 U. S., at 21.

With the elimination of the police power, the *Plessy* doctrine must rest on the sole ground that segregation operates with equal stringency on the groups doing the segregating as well as the groups being segregated. Indeed, it has been noted that "the inclusion of both bases in a single sentence [in the *Plessy* opinion] leads one to wonder whether Mr. Justice Brown ever intended to enunciate the police power basis as an independent proposition sufficient alone to support the statute or whether the basis under which the statute was upheld as a valid exercise of the police power did not rest on the conclusion that the statute did in fact operate equally on all races." *Note*, 21 So. Cal. L. R. 358, 369.

This same article goes on to observe:

> "Despite Mr. Justice Brown's allusion to the State police power, subsequent decisions of the Court clearly indicated that it was the fact of equality of application upon which it would rely. The question next arose with respect to the Oklahoma 'Separate Coach Case.' There the statute, in addition to imposing the requirement of equal but separate accommodations for Negroes and whites, provided that the carrier might maintain sleeping and dining cars for white passengers and not for Negroes, if there should not be sufficient demand for such facilities by Negroes to make their maintenance practicable. The Court upheld the statute insofar as it provided for segregation into equal accommodations, but held that the

statute could not authorize discrimination in the maintenance of luxury facilities, since the discrimination could be maintained *only if it applied equally to all races.* Again, equality of application was made the *sine qua non* of validity, without reference to any reasonable police power basis."

But the "equality" theory has also been destroyed by recent decisions by this Court. In particular, it runs afoul of the statement in the *Shelley* case that equality is not achieved by "indiscriminate imposition of inequalities" (*supra*, p. 15). If this obvious principle is consistently applied, the *Plessy* doctrine must fall.

C. The Factual Assumptions Made in the *Plessy* Decision Were Erroneous

The *Plessy* decision itself recognized that segregation would be unconstitutional if it was designed to or did create a caste system. However, it made the basic factual assumption that it was a "fallacy [to assume] that the enforced separation of the two races stamps the colored race with a badge of inferiority" (163 U. S., at 551).

The best that can be said for this statement is that it was handed down over fifty years ago at a time when the results of applying the separate but equal doctrine could only be surmised. In the ensuing decades, the failure of that prediction has become manifest. If proof of this were necessary, it has been supplied by the developed techniques of the social scientists, all of whom are agreed that segregation has profoundly adverse effects on the Negro community. *Segregation In Public Schools — A Violation of "Equal Protection,"* 50 Yale L. J. 1059, 1061; Gallagher, *American Caste and the Negro College* (1938); Davis and Dollard, *Children of Bondage*, 1940; Woofter, *The Basis of Racial Adjustment* (1925); Bond, *The Edu-*

cation of the Negro in the American Social Order (1934). Surely this Court cannot continue to extend judicial approval to a notion which has been thoroughly discredited in that laboratory which is the nation itself.

(1) Segregated Facilities Necessarily Have a Lower Value

In other areas less controversial and perhaps less significant, our legal system has recognized that mere identity of physical facilities does not necessarily amount to equality either in the economic, political or legal sense. The law would not hold, for example, that an estate has been divided equally between two children each receiving one of the two identical houses comprising the estate, if one of the houses were located in a busy banking district and the other 50 miles from the nearest railroad station. The result would be the same even if the two identical houses were located on the same street opposite each other, but if, for some reason, one side of that street were fashionable and sought after, the other neglected and rejected. Equality is determined in fact and in law not by the physical identity of things assigned in ownership, use or enjoyment but by the identity or substantial similarity of their value.

These legal principles apply not only to property rights but also to political and civil rights. American law demands, in the enjoyment by persons of government-furnished facilities, an equality not less real and substantial than the one it exacts for the protection of heirs, partners or stockholders. "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled"

(*Oyama* v. *California*, 332 U. S. 633). In calling for "equal protection", or for "equal facilities", or for the outlawing of "undue or unreasonable prejudices or disadvantages", the Constitution and the laws of the United States call for genuine equality of protection and not for a merely formal or physical identity of treatment.

The important factors to be considered in assessing the equality of the treatment accorded various groups in our society are the ideas or expectations which are stimulated by that treatment, and the conception conveyed to each minority of the role it is being called upon to play. It is undeniably true that in the South, when the Negro was considered chattel property, any relation of the most intimate degree between white and Negro could be entered into with impunity. Even today Negro servants still may approach as close as necessary to the white persons being served without untoward social consequence. Yet it is equally true that merely "shaking a black hand may be very repulsive to a white man if he surmises that the colored man conceives of the situation as implying equality." Johnson, *Patterns of Negro Segregation*, 1943, page 208. Clearly it is the social definition of the situation that accounts for the difference. Those who insist upon the caste system in our society freely and unstintingly agree to the ritual of equal physical facilities so long as somehow there is also an accompanying communication that inferiors are to remain inferiors.

Segregation provides the ready vocabulary for that communication. It is a vocabulary effectively understood by all. Segregation provides a graphic and literal response to the demand of the white world that Negroes be kept "in their place." To the whites the enforced separation of races is clearly understood as a symbolic affirmation of white dominance, dominance which, to keep itself alive, demands as tribute the continuous performance of the racial etiquette. See Doyle, *The Etiquette of Race*

Relations (1937). Similarly, Negroes appreciate the implications of segregation (Stouffer, *Studies in Social Psychology in World War II*, Vol. 1, p. 566), resent its slur (Moton, *supra*, pp. 238-239), and resist it as a none too subtle mechanism for anchoring them in inferiority (Davis and Dollard, *Children of Bondage* [1940], p. 245).

A Southern attorney has observed of Negroes, "I don't object to their having nice things, but they would not be satisfied with the finest theatre in the world . . . They don't want things for themselves." *Johnson, op. cit., supra*, at page 217. This is, of course, both accurate and perceptive. Negroes desire access to the world of all, not to one just as good.

It is, therefore, easy to understand the general belief in both the white and Negro communities that the facilities relegated to the segregated group are made inferior by the very act of separation. We have long known that the value and desirability of many objects, facilities, traits or characteristics may depend not so much upon their intrinsic qualities or defects, advantages or shortcomings as upon their association with, or use by, persons enjoying a certain reputation. The desirability of a beautiful resort may be lessened by its being visited by people deemed of "low" social standing. If a group considered "inferior" by the prevailing community sentiment adopts any given color of garment, accent of speech, or place of amusement, that color, accent or place will automatically be shunned by the majority and become less desirable or valuable.

If the Nazis, while proclaiming the essential inferiority of the "Jewish Race", had compelled Jews to wear clothes of one color while reserving another to the master race, it could not have been said that Jews received equal clothing facilities. Nor would the discriminatory and humiliating character of the measure depend on whether the colors were brown for the Jews and black for the others, or vice

versa. The exclusive allocation of a given color, any color, to a race declared "inferior" would make that color less desirable. The inferiority thus transmitted from the wearer to the garment would destroy the genuine "equality" of the furnished facilities. The Nazis understood this fully; they achieved much the same effect when they imposed on Jews the wearing of the Yellow Star of David. *Polizei-verordnung uber die Kennzeichnung der Juden vom* 1., September, 1941, RGBI, I. S. 547, Ausgeg. am 5. IX. 1941.

We do not agree that the physical facilities furnished segregated groups are ever in fact equal (*infra*, pp. 29-30). But even assuming, *arguendo*, that those enforcing the segregation policy were lavish in their expenditures, they would not thereby attain real equality of treatment. The five-foot partition in the present case dividing the dining car into Negro and white portions serves a more fundamental purpose than the mere physical separation of white from Negro and the elimination of any likelihood of physical contact. It serves as a ceremonial separation of the dominant from the subordinate and it marks the outside limits beyond which tolerance is impermissible. Under these circumstances the quality of the silverware, glassware, or linen becomes irrelevant. Separation stamps the trappings of equality with the unmistakable sign of inferiority.

In sum, segregation is the artifice by which a dominant group assures itself of its own worth by insisting on the inferiority of others. Segregation, like slavery, has as its function "the fact that it raises white men to the same general level, that it dignifies and exalts every white man by the presence of a lower race". Jefferson Davis, quoted in *Jenkins, Pro-Slavery Thought in the Old South* (1935), at page 192.

(2) Even if the Facilities Are in All Respects Equal in Value, Segregation Is Discriminatory Because of the Adverse Effects Which It Has On the Negro Community

The unconstitutional inequality of segregation may be shown without reference at all to the facilities provided. The inequality appears in the depressing effect which it has on the individual members of the Negro community.

A survey of professional sociological, anthropological and psychological opinion on this subject has been conducted by Drs. Max Deutscher and Isadore Chein of the Commission on Community Interrelations of the American Jewish Congress. Eight hundred and forty-nine social scientists were polled, including the entire membership of the American Ethnological Society, the Division of Personality and Social Psychology of the American Psychological Association, and all of the members of the American Sociological Society who listed race relations or social psychology as their major field of interest. Returns were received from 517, or 61% of the number sent. 90% of the respondents indicated their opinion that enforced segregation has detrimental psychological effects on segregated groups even though equal facilities are provided. 4% failed to answer the item and only 2% indicated that segregation is free of such detrimental effects. Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 The Journal of Psychology 259 (1948).

On the basis of what they have seen and know, these social scientists united in rejecting the separate but equal doctrine as a serviceable formula. In responding, many of them amplified their answers with additional comment. Those who conducted the survey remark that "the gist of these comments was the emphasis on the essential irrelevance of the physical attributes of the facilities fur-

nished". Deutscher and Chein *op. cit., supra,* at page 280. The comments are quoted extensively in the article.

The detrimental psychological effect is not hard to explain. Bearing the approval of this Court, the "separate but equal" doctrine has supplied the rationale for a detailed and exhaustive oppression of the Negro population of the South. Dr. Reid has shown that where racial segregation is established:

> ". . . every aspect of life is regulated by the laws on race and color. From birth through education and marriage to death and burial there are rules and regulations saying that you are born 'white' or 'colored'; that you may be educated, if colored, in a school system separated on the basis of race and 'as nearly uniform as possible' with that available for whites; that you may marry a person of your choice only if that person is colored, this being the only celebration of marriage a colored minister of the gospel may perform; and that when you die (in Atlanta, at least) you may not be buried in a cemetery where whites are interred.
>
> "But that isn't all. Between birth and death colored persons find that the law decrees that they shall be separated from white persons on all forms of transportation, in hotels or inns, eating places, at places of recreation or amusement, on the tax books, as voters, in their homes, and in many occupations.
>
> "To be specific, it is a punishable offense in Georgia for a barber shop to serve both white and colored persons, or for Negro barbers to serve white women or girls; to bury a colored person in a cemetery in which white people are buried; to serve both white and colored persons in the same restaurants within the same room, or anywhere under the same license. Restaurants are required to display signs reading *Licensed to serve white people only,* or

Licensed to serve colored people only. The law also declares that wine and beer may not be served to white and colored persons 'within the same room at any time'. Taxis must be marked *For White Passengers Only,* or *For Colored Passengers Only.* There must be white drivers for carrying white passengers and colored drivers for carrying colored passengers" (Ira de A. Reid, *Southern Ways,* Survey Graphic, Jan. 1947, p. 39).

Dr. Reid's list, of course, is not exhaustive. See, for example, the first six chapters of Johnson, *op cit., supra.* Myrdal asserts that no one can yet estimate the extent of discriminatory practices in the United States. Myrdal, *An American Dilemma* (1944), at 1359.

This carefully contrived web of deprivation and distinction confronts the Negro at every turn. The "thousand and one precepts, etiquettes, taboos and disabilities [which] * * * express the subordinate status of the Negro people and the exalted positions of the whites" (Myrdal, *op. cit., supra,* 66) have a shattering effect upon the Negro personality. DuBois, *Dusk of Dawn* (1940), pages 130-131. "The Negro in America and in general is an average and ordinary human being who under a given environment develops like other human beings." *Black Reconstruction* (1935), Foreword. He is, therefore, understandably warped by living in a world which blatantly advertises its convictions of the Negroes' inferiority. Segregation stimulates a variety of unhealthy responses. It may tend to induce withdrawal, thus extending the isolation of Negroes in America and widening the gap between the racial communities. Myrdal, *op. cit., supra,* page 28. "The Negro genius is imprisoned in the Negro problem" (*Ibid.*). See also Johnson, *An Autobiography of an Ex-Colored Man* (1927), p. 21; Tuck, *Not With The Fist* (1946), p. 107.

Segregation has equally devastating effects when it induces submission rather than rebellion—when it leads to

acceptance of the inferior status defined in the institutions of the dominant community. This attitude invariably stultifies Negro growth and encourages indifference, apathy and unwillingness to compete.

> "Accommodation involves the renunciation of protest and aggression against undesirable conditions of life and the organization of character so that protest does not appear but acceptance does. It may come to pass in the end that the unwelcome force is idealized, that one identifies with it and takes it into the personality, that some time it even happens that what is at first resented and feared is finally loved. In this case a unique alteration of the character occurs in the direction of masochism". Dollard, *Caste and Class in a Southern Town,* at page 255.

Finally, the deleterious effects of segregation find inexorable expression in a deep sense of personal insecurity. Fear of his own inadequacy turns the Negro against the whites who have inflicted his frustration, against his own people for providing a heritage of pain or against himself in an over-weaning guilt for his own secret wishes to be free of his burden.

One psychologist has noted particularly the deep resentment induced by the discrepancy between the vaunted American creed that all are created equal and the bitter fact of subjugation through segregation:

> "The effects of this enforced status on the level of self-esteem, on feelings of inferiority and personal insecurity, the gnawing doubts and the compensatory mechanisms, the blind and helpless and hard to handle more or less suppressed retaliatory rage, the displaced aggression and ambivalence toward their own kind with a consequent sense of isolation and of not belonging anywhere—all of these and much more are bad enough, but the ambiguity of status created by

a society which insists on the fact that all men are born free and equal, and then turns about and acts as if they were not is even worse. The constant reminder—and even boasting—of this equality acts like salt upon a raw wound and, more basically, places them in a profoundly ambiguous and unstructured situation. Human beings simply cannot function efficiently in such situations if they have strong feelings and are strongly motivated—as many, if not most or all, members of discriminated against minority groups are—with regard to these situations." Deutscher and Chein, *op. cit., supra,* at page 272.

Psychic injury always accompanies segregation. We think it patent that as between a system which imposes such penalties and one which does not, there can be no talk of equality.

POINT II

A requirement of equality can never be satisfied by segregated facilities because the official act of segregation of itself gives superior value to the facilities assigned to the dominant group.

We have shown above that the separate but equal doctrine has in fact resulted in inequality and the creation of a caste system. We show here that that is an inevitable result of officially imposed segregation and that since the discrimination flows from official action, it is unconstitutional.

While the segregation in the present case was originally formulated by a private agency, the railroad, it has the same status before this Court as governmentally imposed segregation. We have stated the reasons for this

equivalence above (p. 9); namely, that the railroad's regulation was approved by the I. C. C. and that the railroad is a state-created monopoly which may not discriminate.

A. An Official Policy of Segregation Would Be Unconstitutional if Maintenance of Racial Superiority Were Proclaimed as Its Purpose

It can hardly be disputed that an official regulation providing for the confinement of any racial or religious group to separate cars or to certain portions of a single car upon the declared theory that the group is inferior would be discrimination. That much is virtually conceded in the *Plessy* decision (*supra*, p. 17). The official declaration of inferiority would of itself establish an inferiority of value substantial enough to have constitutional significance (*supra*, p. 18). While the declaration of inferiority alone might be immune to constitutional attack it becomes subject to judicial restraint when accompanied by action having a discriminatory effect. The formal assignment of separate areas based on a formal statement of inferiority would be an assignment of facilities inferior *per se* regardless of their physical identity with the facilities assigned to the dominant group.

The situation as here described would not be mere *social* inequality. We may assume that social inequality has antedated the official ruling. But the accompanying declaration of that pre-existing social inferiority and the ensuing action of assignment of facilities, inferior because segregated, amount to the creation of a *legally sanctioned* inequality.

B. The Placing of a Racial or Religious Group in an Inferior Status by Segregation Can Be Accomplished Without an Express Declaration of Such Status

We do not have here, of course, an express statement by the Southern Railway Co. or the Interstate Commerce Commission that the purpose of the segregation is to maintain inequality. Nevertheless, the same results must be reached if that is in fact its purpose or effect. A regulation may not accomplish by indirection what it may not achieve directly. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Guinn and Beal* v. *United States*, 238 U. S. 347, 364; *Myers* v. *Anderson*, 238 U. S. 368; *Neal* v. *Delaware*, 103 U. S. 370.

The failure of a statute or regulation expressly to declare a legal inferiority does not protect it from the scrutiny of the courts. When the reasonableness of a classification endorsed by any governmental body as a basis for action is in question, the courts will look behind the apparent intention to determine whether or not, in fact, an unlawful classification has been made. *Henderson* v. *Mayor*, 92 U. S. 259, 268; *Bailey* v. *Alabama*, 219 U. S. 219, 244; *Penn Coal Co.* v. *Mahon*, 260 U. S. 393, 413.*

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* Any classification adopted by a governmental body as the basis of official action must be viewed not in the abstract but realistically in the social setting in which it operates. The judge "must open his eyes to all those conditions and circumstances . . . in the light of which reasonableness is to be measured . . . In ascertaining whether challenged action is reasonable, the traditional common law technique does not rule out but requires some inquiry into the social and economic data to which it is to be applied. Whether action is reasonable or not must always depend upon the particular facts and circumstances in which it is taken." Harlan F. Stone in 50 Harvard Law Review, pp. 4, 24 (1936). See also *Poindexter* v. *Greenhow, supra; Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387-388; *Connor* v. *Board of Commissioners of Logan County, Ohio*, 12 F. (2d) 789, 795. Furthermore, this Court has declared that "where the facts as to the situation and the conditions are such as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance." *Dobbins* v. *Los Angeles*, 195 U. S 223, 240. *Yick Wo* v. *Hopkins*, 118 U. S. 356, is the classical application of this approach to prevent racial discrimination.

The implicit rather than the explicit declaration of inferiority may be made in at least two ways: First, the inferiority may have been established in other official acts. Thus, if statutes, judicial decisions or other official pronouncements declare that a particular race is inferior, the assignment of separate facilities becomes an assignment of inferior facilities. We shall show below that such independent declarations of inferiority have in fact been made.

Second, the regulations may incorporate an already established social stratification. Formal adoption of social classifications of necessity implies the adoption of the meaning inherent in, and inseparable from, the classifications themselves, that of the respective inferiority and superiority of the groups. Whenever law adopts a social classification based on a notion of inferiority, it transforms the pre-existing *social* inequality into *official* inequality. What ensues is official discrimination, a denial of equality before the law, whether or not the statement of inferiority is made openly by the government or inheres in the classification upon which official action is based.

The reason that constitutional inhibitions attach when governments give official sanction to pre-existing social inequalities is that such action causes a change in both the degree and nature of the inequality. Once a social classification based on group inferiority is formally adopted, the ensuing official inferiority will in its turn intensify and deepen the social inequality from which it stems. The actual operation of segregation statutes illustrates this oppressive function of the law. It is well known, for instance, that the doctrine of "separate but equal" facilities has proved to be a mere legal fiction in most cases, that invariably segregation has been accompanied by gross discrimination, and that absolute equality seldom, if ever, exists. For example, the President's Committee on Civil Rights found that the "separate but

equal" doctrine "is one of the outstanding myths of American history for it is almost always true that while indeed separate these facilities are far from equal" ("To Secure These Rights," pp. 81-82).

This situation involves at the same time another kind of vicious circle. The effect of segregation laws makes their spontaneous repeal or amendment a practical impossibility. When a more or less inarticulate social feeling of racial superiority is clothed with the sanction of official regulation, that feeling acquires a concreteness and assertiveness which it did not possess before. The stricter the regulation, the stronger and the more articulate the feeling of social distance. And the stronger that feeling, the stricter the regulation and the more difficult its amendment or repeal. In such a setting, the democratic processes themselves are threatened and no reliance can be placed on their correcting effect. It is this situation which Chief Justice Stone had in mind when, in sustaining an economic measure as presumptively valid, he warned that the decision did not foreclose the question whether "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation" and whether "similar considerations enter into review of statutes directed at particular religious . . . or national . . . or racial minorities." Accordingly, he noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products*, 304 U. S. 144, 154, footnote 4.

We shall show in the following sections that the system of segregation is in fact designed to maintain inequality.

C. The Segregation of Negroes Maintains an Officially Declared Status of Inferiority and Also a Previously Established Status of Social Inequality

1. Official Declarations of Inferiority

State imposed segregation stems directly from a vestigial theory of the superiority and inferiority of races inherited as a remnant of the institution of slavery. With the freeing of slaves, attempts were made by the dominant white group to preserve its position of ascendancy by the enactment of discriminatory legislation. "It required little knowledge of human nature to anticipate that those who had long been regarded as *an inferior and subject race* would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike and that state laws might be enacted or enforced to perpetuate the distinctions that had before existed." *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (italics supplied). Thus, in the post-slavery period, Negroes were punished with greater severity than whites for identical offenses. See *General Laws under the Seventh Legislature of the State of Texas*, Chapter 1[illegible]. And Negroes were made incompetent as witnesses in proceedings against white persons. *Laws passed by First Legislature of the State of Texas, An Act to regulate proceedings in a District Court*, Section 65. In the State of Texas the abiding conviction of the inferiority of the Negro race is manifest even in its assessment statutes. "Assessors shall receive 3¢ each for each white inhabitant residing in the county * * * 2¢ for each white inhabitant in a town or city and 1¢ for each slave or free person of color." *Laws passed by the First Legislature of the State of Texas, An Act to Provide for the Enumeration of the Inhabitants.*

These official declarations of inferiority have by no means been abandoned by the Southern states. They are maintained and reiterated in the many decisions holding

that the word "Negro" or "colored person" if applied to a white person gives rise to a cause of action for defamation. *Flood* v. *News and Courier Co.*, 71 S. C. 112; *Stultz* v. *Cousins*, 242 F. 794. Every court which has considered the question has held that writing that a white man is a Negro is libelous per se. *Upton* v. *Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970; *Collins* v. *Oklahoma State Hospital*, 76 Okla. 229, 184 Pac. 946; *Hargrove* v. *Okla. Press Pub. Co.*, 130 Okla. 76, 265 Pac. 635; *Flood* v. *News and Courier Co.*, 71 S. C. 112, 50 S. E. 637; *Stultz* v. *Cousins*, 242 Fed. 794 (C. C. A. 6). It is believed that Alabama, Georgia, Illinois, and Kentucky would concur because of expressions in the opinions of their courts. *Jones* v. *Polk & Co.*, 190 Ala. 243, 67 So. 577; *Atlanta Journal Co.* v. *Farmer*, 48 Ga. App. 273, 172 S. E. 647; *Wright* v. *F. W. Woolworth Co.*, 281 Ill. App. 495; *Williams* v. *Riddle*, 145 Ky. 459, 140 S. W. 661. See Mangum, *The Legal Status of the Negro*, 1940, at p. 18.

The attitudes of these courts is clear. "It is a matter of common knowledge that, viewed from a social standpoint, the Negro race is in mind and morals inferior to the Caucasian. The record of each from the dawn of historic time denies equality." *Wolfe* v. *Georgia Railway Electric Co.*, 2 Ga. App. 499. Similarly, the highest court of Oklahoma has declared: "In this state, where a reasonable regulation of the conduct of the races has led to the establishment of separate schools and separate coaches, and where conditions properly have erected unsurmountable barriers between the races when viewed from a personal and social standpoint, and where the habits, the disposition, and characteristics of the race denominate the colored race as inferior to the Caucasian, it is libelous per se to write of or concerning a white person that he is colored. Nothing could expose him to more obloquy, or contempt, or bring him into more disrepute, than a charge of this character." *Collins* v. *Okla-*

homa State Hospital, 76 Okla. 229. A Texas court has ventured the opinion that, "Although we have no Texas case holding that to falsely charge a white person as being a Negro would be slanderous, yet in view of the social habits, social customs, traditions and prejudices prevalent in this state in regard to the status of whites and blacks in this state, we think such a charge would be slanderous." *O'Connor* v. *Dallas Cotton Exchange*, 153 S. W. 2, 266.

Even more direct proof that the segregation statutes rest on doctrines of racial superiority may be found in the courts' attitude when the statutes are misapplied. Their consistent holding that it is humiliating to require a white passenger to ride in a Jim Crow car betrays official recognition that the facilities are not equal even in the eyes of the law.

Thus, in a Texas case, the court declared, "To withhold from a white lady the right to ride in a coach such as the law requires to be provided for her race and to compel her and her children to ride in one occupied by Negroes for whom under law it is provided exclusively constitutes such a violation of law and breach of duty as to render it liable for damages for such discomfort and humiliation as are proximately caused from such breach of duty." *M. K. T. Railway Co. of Texas* v. *Ball*, 25 Tex. Civil App. 500, 61 S. W. 327. Similar decisions were reached in *Louisville and N. R. Co.* v. *Ritchel*, 148 Ky. 701; *Chicago, R. I. and P. Ry. Co.* v. *Allison*, 120 Ark. 54.

Consistently with these cases, a white passenger could recover damages if he were now required to sit at the dining car table which the railway assures us is now available to appellant. If the law recognizes damage in such a case, how can it, in any sense, view the facilities as equal?

2. The Previously Established Social Inequality

"Supremacy" is not "equality." That proposition needs no elaboration. Yet it is easy to show that the doctrine of segregation is irrevocably linked with the equally widely held, though admittedly unconstitutional, doctrine of "white supremacy." At the very least, it has led to that doctrine, as Justice Harlan predicted in his dissenting opinion in *Plessy* v. *Ferguson,* 163 U. S. at 559-564.

It is consequently not strange that students of segregation statutes uniformly find that they rest on notions of superiority. By segregation "racial and cultural differences between southern whites and slaves were translated into terms of unquestionable superiority and inferiority." Johnson, *op. cit.* p. 158. "Systematic discrimination against a racial minority usually assumes the form of segregation. The subordinate status of the group may, in fact, be inferred from the modes of segregation to which it is subjected." McWilliams, *Race Discrimination and the Law,* Science and Society, Vol. IX, No. 1 (1945). Indeed, the entire pattern of mores governing Negro-white relationships is inexplicable except in the terms that "In the magical sphere of the white man's mind, the Negro is inferior, totally independent of rational proofs or disproofs. And he is inferior in a deep and mystical sense. The 'reality' of his inferiority is the white man's own indubitable sensing of it, and that feeling applies to every single Negro . . . the Negro is believed to be stupid, immoral, diseased, lazy, incompetent, and *dangerous*—dangerous to the white man's virtue and social order." Myrdal, op. cit. p. 100. Under these conditions "it is fallacious to say . . . that the intention and effect [of segregation] is not to impose any badge of inferiority. . . . When a Negro workingman or woman is seated in the third seat of a street car on St. Charles Avenue in New Orleans and when a white man and woman is seated on the fourth

seat, separated only by a bit of wire mesh ten inches high on the back of the third seat this is a 'separation' that is merely a symbolic assertion of social superiority, a 'ceremonial' celebration.'' McGoyney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Calif. L. Rev. 5 at p. 27 (1945).

It is equally important that those States which have rejected the theory of inferiority by passing laws prohibiting racial discrimination have uniformly interpreted those laws as prohibiting segregation. *Joyner* v. *Moore-Higgins Co.*, 152 App. Div. 266 (N. Y.); *Ferguson* v. *Gies*, 82 Mich. 358; *Bolden* v. *Grand Rapids*, 239 Mich. 318; *People* v. *Board of Education of Detroit*, 18 Mich. 400; *Crosswaith* v. *Berger*, 95 Colo. 241; *Jones* v. *Kehrlein*, 194 P. 55 (Cal.); *Prowd* v. *Gore*, 207 P. 490 (Cal.); *Wysinger* v. *Crookshank*, 23 P. 54 (Cal.); *Tape* v. *Hurley*, 66 Col. 473; *Anderson* v. *Pantages*, 114 Wash. 24; *Randall* v. *Cowlitz Amusements*, 194 Wash. 82; *Baylies* v. *Curry*, 128 Ill. 287; *Pickett* v. *Kuchan*, 323 Ill. 138; *Clark* v. *Directors*, 24 Iowa 67.

In short, the sole importance of segregation is to give whites—no matter how low on the social scale—a sense of power and importance. Dollard, *Caste and Class in a Southern Town* (1937), page 98. This is reflected in the candid admission of a Kentucky court considering statutes requiring segregation in transportation facilities within that State. "It is also beyond dispute that the sentiment reflected in this legislation and in these opinions does not find the end or the perfection of its purpose in mere race separation alone. It goes much further in that, as is shown in the general feeling everywhere prevailing, the Negro, while respected and protected in his place, is not and cannot be a fit associate for white girls or the social equal of the white race. To conditions like these that are everywhere about them as a part of the social order and

domestic economy of the state, courts cannot shut their eyes. They must . . . notice . . . the position of the races and the attitude of the white race toward the Negro." *Axton-Fisher Tobacco Co.* v. *Evening Post*, 169 Ky. 64.

POINT III

The separate but equal doctrine has never been, and should not now be, applied to Section 3(1) of the Interstate Commerce Act by this Court.

This Court has never ruled that the prohibition of discrimination incorporated in Section 3(1) of the Interstate Commerce Act was satisfied by separate but equal facilities. *Hall* v. *De Cuir*, 95 U. S. 485 and *Morgan* v. *Virginia*, 328 U. S. 373 held that state statutes forbidding or compelling segregation are unconstitutional insofar as they apply to interstate carriers because they intrude upon federal control of interstate commerce. *McCabe* v. *A. T. & S. F. R. R. Co.*, 235 U. S. 151, held that a state law requiring discrimination was unconstitutional because it violated the Fourteenth Amendment. *Chiles* v. *Chesapeake & Ohio R. Co.*, 218 U. S. 71, sustained segregation self-imposed by a carrier; but the complainant in that case failed to rely on Section 3(1) and this Court did not refer to it.

Thus, the only case in which this Court has considered racial discrimination under Section 3(1) is *Mitchell* v. *U. S.*, 313 U. S. 80. There it held that the denial of certain accommodations was clearly discriminatory (and hence illegal. Declining to go further, it noted specifically that it was considering "not a question of segregation but one of equality of treatment" (313 U. S. at 94).

We submit that this Court can hold here that segregated facilities do not satisfy Section 3(1) without overthrowing the application of the *Plessy* doctrine to the

Fourteenth Amendment. The language of Section 3(1) unequivocally prohibits any carrier from subjecting any person "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Obviously this sweeping injunction to be distinguished from the more general provision that no person shall be deprived of "equal protection of the laws."

Indeed we believe that the language of Section 3(1) is closer to that of the statute invoked in *R. R. Co.* v. *Brown*, discussed above (pp. 11-12). The *Brown* case was distinguished in the *Plessy* decision on the ground that the statute there invoked prohibited "exclusion" from the cars (163 U. S., at 546). Clearly that statute is closer in language to the equally explicit terms of Section 3(1) than the "equal protection" clause of the Fourteenth Amendment. We submit that the *Brown* case is a more direct precedent for the present case than the *Plessy* case and requires reversal of the judgment below.

CONCLUSION

It is respectfully submitted that for the reasons stated above the judgment below should be reversed.

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